APPEAL NO. 020458
FILED APRIL 9, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 11, 2002. The appealed issue was:

1. What is the appropriate reduction of the [appellant] Claimant's impairment income benefits [IIBs] based on contribution from an earlier compensable injury?

The hearing officer determined that "[IIBs] and supplemental income benefits [SIBs] for the [second] compensable injury, if any, are reduced by 94% based on contribution from the [first] compensable injury . . . ."

The claimant appeals, emphasizing that she was able to return to work after her first injury but has been unable to do so after her second injury, which involved surgery to additional levels of her lumbar spine. The claimant also argues that the "[respondent self-insured] carrier should not be awarded a reduction for [IIBs] and [SIBs] until the adequate information is provided for review and determination," otherwise it would cause a "huge overpayment and extreme financial hardship." The self-insured responds, generally urging affirmance.

DECISION

Affirmed as modified.

It is undisputed that the claimant sustained a compensable low back injury on _____ (the first injury), which required spinal surgery at L4-5 and L5-S1. The claimant received a 16% impairment rating (IR) for that injury based on 11% impairment from Table 49, Section II (apparently E and F) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and 6% for loss of range of motion (ROM). There is ample evidence that the claimant returned to work in March 1999, initially working four hours a day until she was working full time, at perhaps modified duty. The claimant sustained a second compensable injury on _____, which resulted in a second surgery on October 16, 1999, involving fusions at L3-4, L4-5, and L5-S1 with hardware (cage). The claimant's treating doctor assessed a 17% IR (10% impairment from Table 49 and 8% loss of ROM). In a report dated September 15, 2000, a designated doctor for the second injury assessed a 15% IR (10% from Table 49 Section (II)(F) plus 2% impairment "for the two additional levels of surgery that she underwent").

The self-insured requested contribution through a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) dated July 27, 2001. A Texas

Workers' Compensation Commission (Commission) order dated August 15, 2001, approved a 100% contribution. Dr. O was asked by the self-insured to do a peer review to determine if he agreed "that the carrier should be granted 100% contribution." In a report dated October 16, 2001, Dr. O commented that the designated doctor for the second injury was in error; specifically detailed that the correct IR, using the doctor's own figures, should be 17%; and concluded that the correct contribution should be "15% out of 17% due to the old injury and 2% out of 17% due to the new injury." (Dr. O was apparently under the impression that the claimant had a 15% IR for the first injury instead of the actual 16%.)

The hearing officer was aware the claimant's IR was 15%; he reviewed the various reports and commented:

> [B]ased on the representations of the carrier that the Claimant should have been assigned this higher [IR] for the second injury than the [IR] she received, I accept for purposes of this decision and the issue of contribution only, that the documented [IR] for the second injury was 17%. This correctly reflects that the second injury was more serious than the first.
>
> Given the clear cumulative and continuing effects of the first injury after the second injury, I conclude that the proper contribution is 16/17ths, or 94%.

The fact that the claimant returned to work after the first injury but not the second is not indicative that the self-insured is not entitled to contribution and we so hold. The hearing officer's decision on contribution is supported by the evidence.

The agreed-upon issue only involved contribution for IIBs; however, the hearing officer's decision, and the parties' argument at the CCH, involved contribution for both IIBs and SIBs and we have held that the same percentage of contribution would apply to both. Also, although not an issue, the claimant raised the question of when contribution would start and there was a lengthy discussion on that matter. The claimant cited, and both parties referred to, Texas Workers' Compensation Commission Appeal No. 002211-S, decided November 6, 2000. The pertinent part of that decision stated:

> We hold that contribution does not apply to any income benefit payments which accrue prior to the filing of a request for contribution. The carrier may only recoup overpayments on IIBs and SIBs that accrue on or after the date the carrier files a request for contribution with the Commission.

Recognizing that recoupment is not an issue before us in the present case, we agree with the principle that contribution does not apply to income benefits before the carrier, or self-insured in this case, files its request for contribution. The self-insured filed its request for contribution on July 27, 2001, which the parties appear to agree was the day prior to the beginning of the second quarter of SIBs. In discussion of Appeal No. 002211-S, the self-insured agreed that if Appeal No. 002211-S applies, the self-insured could "only take out . . . contribution beginning with the second quarter of SIBs." Consequently, the technical

answer to the agreed-upon issue is that there would be no reduction of the claimant's IIBs based on contribution from the earlier 1997 compensable injury. In that the self-insured's request for contribution was only filed just prior to the second quarter of SIBs, contribution in the amount of 94% will only apply beginning with the second quarter of SIBs. We reject the claimant's position that contribution is not effective until the self-insured forwarded all the "documentation to support their request."

The hearing officer's decision and order assigning contribution in the amount of 16/17ths, or 94%, are affirmed as modified with a beginning date of July 27, 2001.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge